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NOTES

The Breath of the Unfee'd Lawyer: Statutory Fee Limitations and Ineffective Assistance of Counsel in Capital Litigation

Albert L. Vreeland, II

In *Powell v. Alabama*¹ and *Gideon v. Wainwright*,² the U.S. Supreme Court established the indigent criminal defendant's right to court-provided counsel. *Powell* first applied the right to be heard by court-sponsored counsel³ to the states in capital cases. Although subsequent decisions defined and shifted the contours of the Sixth Amendment right to counsel,⁴ *Gideon* overruled intervening precedent⁵ and announced the defendant's right to court-provided counsel in all felony prosecutions. Completing the argument begun in *Powell*, *Gideon* declared the right to counsel to be fundamental to a fair trial, applicable to the states through the Fourteenth Amendment.⁶

Despite their rhetorical elegance and power, these decisions offered little guidance to the states on how to meet the constitutional mandate they announced. The fundamental character of the right to counsel entails more than mere formality; it necessarily requires the effective assistance of counsel in preparing and presenting a defense.⁷ Since *Powell*,⁸ the Court has spoken often and with great force to require the provision of counsel,⁹ but has stood silent on how and by whom counsel should be provided.¹⁰

1. 287 U.S. 45 (1932).

2. 372 U.S. 335 (1963).

3. The Sixth Amendment provides simply that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

4. Compare, e.g., *Douglas v. California*, 372 U.S. 353 (1972) (right to counsel in state court appeals of right) with *Ross v. Moffit*, 417 U.S. 600 (1974) (no right to counsel in appeals as of grace).

5. *Betts v. Brady*, 316 U.S. 455 (1942) (right to counsel in state court limited to special circumstances).

6. *Gideon*, 372 U.S. at 341. In *Betts*, the Court held that the right to counsel was not fundamental to a fair trial and therefore was not incorporated into the Due Process Clause of the Fourteenth Amendment. 316 U.S. at 471. *Gideon* overruled *Betts*, finding that the right to counsel was fundamental to a fair trial, applicable to the states as an element of due process. 372 U.S. at 341.

7. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

8. The Court in *Powell* stated: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." 287 U.S. at 68-69.

9. See, e.g., *Gideon*, 372 U.S. 335; *Argersinger v. Hamlin*, 407 U.S. 625 (1972).

10. Although the Court has never expressed a preference as to how counsel should be provided, both Chief Justice Rehnquist and Justice Powell have expressed concern over the cost of

Left to their own devices to meet the Sixth Amendment mandate, the states adopted variations on three delivery mechanisms to provide counsel to the indigent accused.¹¹ Many developed public defender systems in which staff attorneys employed by the state represent indigent defendants.¹² Other states use a contract system in which private attorneys competitively bid to provide indigent representation for an annual fee, irrespective of the volume or complexity of the caseload.¹³ Most indigent defense, however, is provided by court-appointed counsel.¹⁴ Appointed on a case-by-case basis, these private attorneys are usually compensated under a statutory fee scheme allowing separate fixed hourly rates for in-court and out-of-court time,¹⁵ subject to a maximum allowance.¹⁶

Compensation provisions for court-appointed counsel vary widely among states,¹⁷ and tend to be substantially less than the prevailing rates for privately retained attorneys.¹⁸ The discrepancy between the private and statutory rates is exacerbated by provisions limiting compensation to a maximum allowance¹⁹ ranging from \$100 to \$5000, with most states imposing a limitation on felony cases between \$500 and \$1000.²⁰ Because of these limitations, attorneys are not compensated for services after a certain hour. For example, with a maximum

expanding the right to counsel. *Scott v. Illinois*, 440 U.S. 367, 373 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 56-61 (1972) (Powell, J., concurring in result).

11. *SHELDON KRANTZ ET AL., RIGHT TO COUNSEL IN CRIMINAL CASES: THE MANDATE OF ARGERSINGER V. HAMLIN* 201-308 (1976). This discussion omits reference to private defenders, such as the Legal Aid Society of New York City, because of their financial and managerial independence from the state.

12. *Id.* at 211-33.

13. The contract bid system has undergone constitutional challenge analogous to that directed at the appointed counsel system. *See, e.g., State v. Smith*, 681 P.2d 1374 (Ariz. 1984).

14. Sixty percent of the counties in a recent survey provided counsel through court appointments. *ROBERT L. SPANGENBERG ET AL., U.S. DEPT. OF JUSTICE, NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY: FINAL REPORT* 10 (1986). Appointed counsel are also employed in tandem with defender systems when the public defender has a conflict of interest in representing multiple codefendants. *Id.* at 35.

15. Seventy-five percent of the counties that use court-appointed counsel distinguish between time billed for court appearances and time spent for out-of-court preparation, compensating out-of-court time at a lower hourly rate. *Id.* at 18-19.

16. Forty percent of the counties that use court-appointed counsel limit compensation for court-appointed cases to a maximum fee in felony cases, and fifty percent limit compensation in misdemeanor cases. *Id.* at 19; *see also infra* note 23 and accompanying text.

17. The rates of compensation range between \$10 per hour and \$65 per hour, with most counties paying \$20-\$30 per hour for out-of-court time and \$30-\$50 per hour for in-court time. *SPANGENBERG, et al. supra* note 14, at 19.

18. One study has estimated that court appointed counsel are paid forty percent less than privately retained counsel. *NATIONAL STUDY COMM. ON DEFENSE SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES* 267 (1976) [hereinafter *GUIDELINES FOR LEGAL DEFENSE SYSTEMS*].

19. States differ as to whether the statutory maximum applies to all time spent on the case, or only to out-of-court preparation time. *Compare* ALA. CODE § 15-12-21(d) (1975 & Supp. 1990) *with* ARK. CODE ANN. § 16-92-108(b) (Michie 1987).

20. *SPANGENBERG et al., supra* note 14, at 19.

of \$1000 and an hourly rate of \$20, an attorney would exhaust state compensation in fifty hours. Representation beyond the fiftieth hour would be rendered, if at all, at the expense of the attorney.²¹

This scheme for compensating appointed counsel has obvious and dangerous implications for the indigent accused's right to effective assistance of counsel. Fee limitations not only create disincentives to provide representation beyond the last hour for which the attorney will be compensated, but also impose financial burdens that may limit the attorney's ability to render effective assistance. This Note will consider these implications in the context of counsel appointed to defend an indigent accused of a capital crime.²²

This Note argues that fee limitations deprive indigent defendants of their right to effective assistance of counsel. Part I of this Note reviews state court decisions that address Sixth Amendment challenges to fee limitations, yet fail to address the broader concerns about the appointed counsel system. Part II considers the inherent disincentives and burdens fee limitations impose on attorneys and suggests that the limits threaten the indigent accused's right to effective assistance of counsel. A comparison of the fee limitations and the time required to prepare and try a capital case reveals the gross inadequacy of statutory fee provisions. In Part III, this Note argues that, under the current system, the attorney's duty as an officer of the court and the pro bono obligation are improperly invoked in defense of the fee limitations. This Note concludes that the state should shoulder the burden of indigent representation in capital litigation as an essential cost of the criminal justice system.

I. THE SIXTH AMENDMENT CHALLENGE: THE FAILURE OF STATE COURTS TO ADDRESS SYSTEMIC PROBLEMS

Although thirty percent of the country's state jurisdictions compensate appointed counsel under a statutory structure limited by a maximum fee,²³ few have directly addressed the adequacy of defense

21. See *infra* notes 128-31 and accompanying text.

22. This Note frames the issue in terms of capital defense because of the heightened procedural safeguards afforded the capital defendant and the extraordinary complexity and difficulty inherent in capital litigation. See *infra* note 145. The argument can easily be extended to non-capital cases, but applies with more force in the present context.

23. SPANGENBERG et al., *supra* note 14, at 19; see, e.g., ALA. CODE § 15-12-21(d) (1975 & Supp. 1990) (\$1000 felony case; \$1000 capital case, out-of-court time); ARK. CODE ANN. § 16-92-108(b) (Michie 1987) (\$350 felony; \$1000 capital); D.C. CODE ANN. § 11-2604(b)-(c) (1981) (\$1700 felony, with exception for extraordinary cases); FLA. STAT. ANN. ch. 925.036 (Harrison 1991) (\$3500 capital); HAW. REV. STAT. § 802-5(b)(1) (1988) (\$3000 felony with exception); ILL. ANN. STAT. ch. 38, ¶ 113-3(c) (Smith-Hurd Supp. 1991) (\$1250 felony with exception); KY. REV. STAT. ANN. § 31.070(1) (Michie/Bobbs-Merrill 1985) (\$1000 all cases); MISS. CODE ANN. § 99-15-17 (Supp. 1991) (\$2000 capital); NEV. REV. STAT. § 7.125(2) (1987) (\$2500 felony; \$6000 capital); N.M. STAT. ANN. § 31-16-8(B) (Michie 1978) (\$400 felony for work at the district court level); N.Y. COUNTY LAW § 722-b (McKinney 1991) (\$1200 felony; \$2400 capital); OKLA. STAT. ANN. tit. 22 § 1271 (West 1986) (\$500 all cases); S.C. CODE ANN. § 17-3-50 (Law.

counsel subject to such limitations.²⁴ Most litigation over fee limitations has focused, not surprisingly, on the attorney's right to fair compensation. Attorneys have mounted constitutional challenges on claims of uncompensated takings of property and denial of equal protection in violation the Fifth and Fourteenth Amendments, and involuntary servitude in violation of the Thirteenth Amendment.²⁵ State courts have been largely unreceptive to attorney challenges, relying on the attorneys' ethical obligation to perform pro bono public service and their duty as officers of the court.²⁶ Most courts which have considered the Sixth Amendment implications of fee maxima have also summarily dismissed the defendant's concerns on similar grounds.²⁷

This Part reviews the reaction of state courts to Sixth Amendment challenges to fee limitations. Section I.A discusses the seminal case, *State v. Rush*,²⁸ which rejected a Sixth Amendment challenge. Section I.B then summarizes *Makemson v. Martin County*,²⁹ the only case to squarely recognize a Sixth Amendment violation in this context. Section I.C reviews a range of state cases that granted sparing relief on the basis of fairness to the attorney. Section I.D offers possible explana-

Co-op. 1985) (\$500 felony; \$750 capital). Some states allow counties to establish maximum guidelines. See, e.g., GA. CODE ANN. § 17-12-5 (Michie 1990). Others allow the courts to set fee schedules. See, e.g., ARIZ. REV. STAT. ANN. § 13-4013(A) (1989) (court sets fee schedule and county pays attorney); ME. R. CRIM. P. 44(c) (reasonable compensation set by court).

Although some states provide that compensation in excess of the maximum may be awarded in extraordinary cases, courts rarely exercise their discretion. Robert M. Cipes & Philip H. Pennypacker, *Assignment of Counsel in State Courts*, in 1A CRIMINAL DEFENSE TECHNIQUES § 14.10[4] (1990).

The Criminal Justice Act, 18 U.S.C. § 3006A(d) (1988), provides a similar scheme of compensation for counsel appointed to represent indigent criminal defendants in federal court. The Act limits compensation to \$3500 per felony, with an exception in the case of "extended or complex representation." 18 U.S.C. § 3006A(d)(2) & (3) (1988). Despite substantial litigation over the exception, federal judges have been extremely reluctant to grant excess compensation. Dallin H. Oakes, *Obtaining Compensation and Defense Services Under the Federal Criminal Justice Act*, in 1 CRIMINAL DEFENSE TECHNIQUES § 7.08 (Steven W. Allen et al. eds., 1991); see also *Criminal Justice Act: Hearings on H.R. 3233 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary*, 98th Cong., 1st Sess. 54 (1983) [hereinafter *Criminal Justice Act: Hearings*] (statement of Theodore J. Lidz) (under 15% of applications for excess compensation approved).

24. Those courts that have discussed the adequacy have limited themselves to an ad hoc review rather than a broad assessment of the system for providing indigent representation. See, e.g., *Makemson v. Martin County*, 491 So. 2d 1109 (Fla. 1986), cert. denied, 479 U.S. 1043 (1987). But see *State v. Rush*, 217 A.2d 441, 446-49 (N.J. 1966).

25. See, e.g., *Williamson v. Vardeman*, 674 F.2d 1211 (8th Cir. 1982) (involuntary servitude and due process); *United States v. Dillon*, 346 F.2d 633 (9th Cir. 1965) (due process), cert. denied, 382 U.S. 978 (1966); *People v. Atkinson*, 366 N.E.2d 94 (Ill App. Ct. 1977) (equal protection); *Daines v. Markoff*, 555 P.2d 490 (Nev. 1976) (equal protection and due process).

26. See, e.g., *Williamson*, 674 F.2d at 1215; *Dillon*, 346 F.2d at 635. But see *DeLisio v. Alaska Superior Court*, 740 P.2d 437 (Alaska 1987) (ethical obligation did not override constitutional right); *Bradshaw v. Ball*, 487 S.W.2d 294 (Ky. 1972) (same).

27. See, e.g., *Sparks v. Parker*, 368 So. 2d 528 (Ala. 1979); *Resek v. State*, 715 P.2d 1188 (Alaska Ct. App. 1986); *State v. Allen*, 611 P.2d 605 (Kan. Ct. App. 1980).

28. 217 A.2d 441 (N.J. 1966).

29. 491 So. 2d 1109 (Fla. 1986), cert. denied, 479 U.S. 1043 (1987).

tions for the failure of states to face the Sixth Amendment challenge directly.

A. State v. Rush: *Ethics Over Economics*

In *State v. Rush*,³⁰ the Supreme Court of New Jersey established the precedent on which other courts have relied to dismiss constitutional claims by indigent defendants and their attorneys.³¹ After recounting the attorney's common law duty to represent indigent defendants without compensation,³² the court found that representation by uncompensated, appointed counsel was equivalent to representation by privately retained attorneys.³³ The court relied on the absence of empirical evidence to the contrary and on judicial notice that lawyers need only the incentive of their professional obligation.³⁴

To arrive at this conclusion, the court pursued two rationales. First, it dismissed the common criticism that the youth and inexperience of most appointed counsel impaired their ability to represent criminal defendants.³⁵ The court reasoned that young lawyers approached appointed cases with the same responsibility and zeal as did their more seasoned colleagues.³⁶ Lawyers of great repute, the rationale proceeded, had little experience in criminal practice, owing to the lack of financial return in criminal cases.³⁷ Nor did inexperience in

30. 217 A.2d 441 (N.J. 1966).

31. Courts upholding maxima against Sixth Amendment attack have relied heavily on *Rush*. See, e.g., *Sparks v. Parker*, 368 So. 2d 528 (Ala. 1979); *People v. Atkinson*, 366 N.E.2d 94, 99 (Ill. App. Ct. 1977); *Bias v. State*, 568 P.2d 1269, 1271 (Okla. 1977).

32. *Rush*, 217 A.2d at 443-44.

33. 217 A.2d at 445. Other judges have saved no criticism for the quality of defense provided by appointed counsel. See, e.g., LOIS G. FORER, MONEY AND JUSTICE (1984); David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973) [hereinafter Bazelon, *Defective Assistance*]; David L. Bazelon, *The Realities of Gideon and Argersinger*, 64 GEO. L.J. 811 (1976) [hereinafter Bazelon, *Realities*]; Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REVIEW 227, 238 (1973); Sam J. Ervin, Jr., *Uncompensated Counsel: They Do Not Meet the Constitutional Mandate*, 49 A.B.A. J. 435 (1963); Harold H. Greene, *Introduction: Toward Realizing the Promise of Effective Representation in the District of Columbia*, 12 AM. CRIM. L. REV. 781, 784 n.14 (1975); Robert S. Hunter, *Slave Labor in the Courts — A Suggested Solution*, CASE & COM. July-Aug. 1969, at 3.

34. The court stated that "[a] lawyer needs no motivation beyond his sense of duty and his pride." *Rush*, 217 A.2d at 444.

35. For criticisms of the appointed counsel system's reliance on young, inexperienced lawyers, see U.S. ATTORNEY GENERAL'S COMMISSION ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE, REPORT 30 (1963) [hereinafter ATTORNEY GENERAL'S REPORT]; AMERICAN BAR ASSN., GIDEON UNDONE: THE CRISIS IN INDIGENT DEFENSE SPENDING 15 (1982) [hereinafter GIDEON UNDONE]; Bazelon, *Realities*, *supra* note 33, at 812; Laurence A. Benner, *Tokenism and the American Indigent: Some Perspectives on Defense Services*, 12 AM. CRIM. L. REV. 667, 684 (1975); Burger, *supra* note 33, at 238; Bruce J. Havighurst & Peter MacDougall, Note, *Representation of Indigent Defendants in Federal Court*, 76 HARV. L. REV. 579, 582-83 (1963).

36. *Rush*, 217 A.2d at 444-45.

37. 217 A.2d at 444.

criminal practice hamper an attorney's performance because, the court argued, lawyers can move easily between specialties.³⁸ Second, and more remarkably, the court found that most cases did not turn on the skill of the advocate, but simply depended on the facts and the applicable law.³⁹ To temper this bold suggestion, the court added that judges would assume responsibility for counsel serving by their appointment.⁴⁰ By denying the force of experience and discounting the impact of the attorney on the outcome of the case, the court minimized the importance of effective representation and thereby obviated the need for adequate compensation.

Although finding the uncompensated system free of constitutional defect, the court examined the system again under the light of policy considerations and measured the professional burden against a standard of fairness. The obligation to provide counsel to indigents rests with the state,⁴¹ the court held, and the court may compel attorneys to satisfy that burden as a condition of licensure to practice law.⁴² Considering the respective obligations of the court and the attorney, the court found that the criminal caseload had increased in size and complexity such that the bar alone should not bear the burden of indigent representation.⁴³ The conclusion arose not from a constitutional mandate, but from a fair apportionment of the state's obligation among those required to carry it.

38. 217 A.2d at 444-45. This statement may be dated by the nature of criminal practice at the time the case was tried. For the view that criminal practice is highly specialized and not easily entered, see Bazelon, *Defective Assistance*, *supra* note 33, at 12. This is especially true of capital litigation, in which an evolving body of highly technical law prevents successful brief ambulations by counsel unfamiliar with the territory.

39. The court advanced a contrary view in its later argument that defense is not merely presenting the defendant's version of the facts. 217 A.2d at 448. The court's assertion ignores the attorney's role in collecting and marshalling the facts and in researching and arguing the law. See Norman Lefstein, *Keynote Address*, 14 N.Y.U. REV. L. & SOC. CHANGE 5, 7 (1986); Gary Goodpaster, *The Adversary System: Advocacy and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 65 (1986). The attorney performs a critical role in the sentencing phase of a capital trial where he must investigate and present mitigating evidence from the defendant's entire life. *Id.* at 84; see *infra* notes 176-84 and accompanying text.

40. 217 A.2d at 445. The court's assertion here is somewhat cryptic. The court does not suggest how this judicial responsibility will manifest itself, whether through the appointment of competent counsel only or through judicial supervision of the defense. The latter raises questions of the appropriate function of the judge and the independence of the defense. See Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 359 (1983). The former runs contrary to judicial experience. Although a core of attorneys accept appointments in response to ethical imperative, the appointment system is riddled with inexperienced and often incompetent counsel. See *supra* note 33.

41. 217 A.2d at 446.

42. 217 A.2d at 447.

43. 217 A.2d at 448. The court did not completely relieve the bar's burden, suggesting that compensation at sixty percent of the prevailing rate would exact an appropriate contribution.

B. *Makemson v. Martin County: The Reality of Compensation*

In *Makemson v. Martin County*,⁴⁴ the Supreme Court of Florida took a position contrary to the *Rush* court and held that a statutory fee maximum, although not facially unconstitutional,⁴⁵ violated an indigent defendant's right to effective counsel when applied to cases of extraordinary circumstance. Finding the defendant's right to counsel "inextricably interlinked" with the attorney's right to fair compensation,⁴⁶ the court noted that the statute's token compensation endangered the availability of effective counsel "in cases when it is needed most."⁴⁷ The court grounded its finding on its inherent judicial authority to effectuate all "things that are absolutely essential to the performance of [the court's] judicial functions."⁴⁸ The court therefore found that it had both the authority and the obligation to ensure that the accused's right to counsel was protected, an authority that included ordering payment for legal services beyond that provided for by the legislature.

Acknowledging that the allocation of funds may lie within the legislative province, the court resolved the tension between the public treasury and an individual's right to counsel in favor of the individual's constitutional protection.⁴⁹ The legislature's compensatory scheme controls the payment of appointed counsel, except when that scheme is so inadequate as to interfere with the accused's right to counsel.⁵⁰ The Florida court concluded that a statute allocating public funds may not intrude on the inherent judicial authority to guarantee a defendant effective representation.⁵¹

The court further rejected a characterization of the statute as a form of court-imposed pro bono service. First, the court refused to dilute the defendant's right to counsel with the mere invocation of an attorney's common law duty.⁵² The pro bono obligation, the court

44. 491 So. 2d 1109 (Fla. 1986), *cert. denied*, 479 U.S. 1043 (1987).

45. The court found that the appropriation of funds and determination of compensation was ordinarily within the province of the legislature and therefore the statute was facially constitutional. 491 So. 2d at 1112.

46. 491 So. 2d at 1112.

47. 491 So. 2d at 1112.

48. 491 So. 2d at 1113 (quoting *Rose v. Palm Beach County*, 361 So. 2d 135 (Fla. 1978)).

49. 491 So. 2d at 1113. Finding themselves without authority to appropriate public funds, other courts have refused to hear cases in which counsel is inadequately compensated or have refused to require counsel to accept appointments. *See, e.g., State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. 1981) (en banc); *Bradshaw v. Ball*, 487 S.W. 294 (Ky. 1972); *State ex rel. Partain v. Oakley*, 227 S.E.2d 314 (W.Va. 1976). Refusing to entertain prosecutions may prove to be an equally effective response, preventing the trial of an accused without adequate counsel and spurring the legislature to appropriate sufficient funds in the face of a disabled criminal justice system.

50. "At [this] point, the statute loses its usefulness as a guide to the trial judges in calculating compensation and becomes an oppressive limitation." *Makemson*, 491 So. 2d at 1112.

51. 491 So. 2d at 1112.

52. 491 So. 2d at 1114. Although the court is not explicit here, the opinion may be read as a

argued, should not obscure the primary concern of indigent representation by shifting the focus from the rights of the accused to the duty of the attorney.⁵³ Second, the court interpreted the *Gideon* mandate to place the burden of indigent representation upon the state rather than the bar.⁵⁴ It found that the system of token compensation unfairly required a few attorneys, members of the criminal defense bar, to shoulder the burden of the state.⁵⁵

The court reasoned that the growing complexity of litigation and the mounting costs of legal practice prevented attorneys from assuming the cost of indigent defense. The court observed that the compensation within the statutory limit was "insufficient to cover even overhead expenses during the proceeding,"⁵⁶ and recognized the clear "link between compensation and quality of representation."⁵⁷ The state court concluded that Florida's statute encroached on the court's inherent power to protect the defendant's right to effective counsel and therefore did not pass constitutional muster.

Although the *Makemson* court predicated constitutional infirmity on the extraordinary circumstances of the individual case, a later Flor-

refusal to satisfy the right to counsel by invoking the pro bono duty of the attorney for fear the obligation may go unmet.

53. 491 So. 2d at 1114. For a similar view that reference to the attorney's pro bono obligation confuses the defendant's right with the attorney's obligation, see Richard J. Wilson, *Litigative Approaches to Enforcing the Right to Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 203, 206 (1986). See also Benner, *supra* note 35, at 684.

54. 491 So. 2d at 1114. The court noted that as a form of pro bono service, the statute operated in a haphazard and unfair manner. The unfairness owes to the bar's assumption of the state's burden. *White v. Board of County Commrs.*, 537 So. 2d 1376, 1380 (Fla. 1989). The haphazard application derives from the small segment of the bar willing and qualified to accept criminal appointments. See LEE SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS: A FIELD STUDY AND REPORT 19 (1965). Those attorneys and firms most able to commit the time and resources may be the least receptive to criminal appointment. *FTC v. Superior Court Trial Lawyers Assn.*, 110 S. Ct. 768, 772 (1990) (The large "up-town" firm's response to the need for indigent representation was "feeble, reflecting their universal distaste for criminal law, their special aversion for compelled indigency representation, the near epidemic siege of self-doubt about their ability to handle cases in the field . . ."). See Robert L. Nelson, *Practice and Privilege: Social Change and the Structure of Large Law Firms*, 1981 AM. B. FOUND. RES. J. 95, 114; see also *In re Snyder*, 734 F.2d 334, 341 (8th Cir. 1984) (unfair for burden of indigent representation to fall on a small number of criminal defense attorneys); *Criminal Justice Act: Hearings*, *supra* note 23, at 25 (statement of Judge Thomas J. MacBride) (bulk of appointments fall on sole practitioners or small firms for whom the economic burden is greater); *id.* at 73 (statement of Brian P. Gettings) (burden of indigent representation falls on 5-10% of the bar).

55. "[G]ood public conscience [does not] approve [of] such shoddy, tawdry treatment of an attorney called upon by the courts to represent an indigent defendant in a capital case." *Makemson*, 491 So. 2d at 1114 (quoting *Mackenzie v. Hillsborough County*, 288 So. 2d 200, 202 (Fla. 1973) (Ervin, J., dissenting)).

56. 491 So. 2d at 1114. Florida's statute provides for \$3500 for the trial of a capital case, more generous than most. FLA. STAT. ANN. ch. 925.036 (Harrison 1991). Testimony before the trial court, however, valued the attorney's services at \$25,000. 491 So. 2d at 1111.

57. 491 So. 2d at 1114. The court continued, "In our pecuniary culture the calibre of personal services rendered usually has a corresponding relationship to the compensation provided." 491 So. 2d at 1114 (quoting *Mackenzie*, 288 So. 2d at 202 (Ervin, J., dissenting)).

ida decision suggested that the fee limitation would likely be unconstitutional in all capital cases.⁵⁸ The court found that capital cases "by their very nature can be considered extraordinary and unusual and arguably justify an award in excess" of the fee maximum.⁵⁹ The court declined to hold the statute unconstitutional on its face,⁶⁰ but framed its holding to suggest that any capital case that did not warrant an excess fee would be by definition extraordinary.⁶¹

Rush and *Makemson* defined the boundaries within which the Sixth Amendment battle over adequate compensation has been fought. *Rush* placed the duty of indigent representation on appointed counsel bound by their duty to the court, and discounted the importance of compensation, experience, and advocacy in criminal litigation. *Makemson* recognized the inherent power of the judiciary to protect the defendant's right to effective counsel, the state's responsibility to provide counsel to indigents, and the unavoidable link between fair compensation and the quality of representation. Although these two opinions stand in high relief, other states adopted less extreme positions, reviewing compensation on an ad hoc basis. None rely on empirical assessments of the cost of a defense,⁶² nor do they reach broad conclusions on the effectiveness of counsel in a system of undercompensation.⁶³

C. The Response of Other Courts: A Middle Road

Avoiding the extremes of *Rush* and *Makemson*, other courts have followed a middle road, assessing the adequacy of funding relative to the hardship imposed on the attorney before the court.⁶⁴ One approach considers the impaired ability of a financially distraught attorney to serve indigent clients. Another assesses the fair distribution of the indigent defense burden.

Courts examining an individual attorney's financial hardship have

58. *White v. Board of County Commrs.*, 537 So. 2d 1376, 1380 (Fla. 1989).

59. 537 So. 2d at 1378.

60. 537 So. 2d at 1379.

61. The court noted, "[W]e are hard pressed to find any capital case in which the circumstances would not warrant an award of attorney's fees in excess of the current statutory fee cap [of \$3500]." 537 So. 2d at 1378.

62. This appears to be attributable to the failure of counsel to present such evidence to the court. See, e.g., *Sparks v. Parker*, 368 So. 2d 528, 534 (Ala. 1979); *Postma v. Iowa Dist. Ct.*, 439 N.W.2d 179 (Iowa), cert. denied, 493 U.S. 918 (1989).

63. But see *State ex rel. Partain v. Oakley*, 227 S.E.2d 314, 319 (W.Va. 1976) ("[W]e are firmly convinced that there is more than adequate evidence that the burden imposed upon attorneys of this State by virtue of the present system of appointment is rapidly approaching an unacceptable and potentially unconstitutional state.").

64. See, e.g., *Bias v. State*, 568 P.2d 1269 (Okla. 1977); *People ex rel. Conn v. Randolph*, 219 N.E.2d 337, 340 (Ill. 1966) ("[T]he court's inherent power to appoint counsel also necessarily includes the power to enter an appropriate order ensuring that counsel do not suffer an intolerable sacrifice and burden . . .").

generally held that greater compensation may be ordered when the attorney's practice is burdened by undue financial strain. Unmoved by mere financial loss, these courts have required a strong showing of hardship approaching financial ruin.⁶⁵ Apparently reasoning that an attorney *cannot* provide the requisite representation when his practice faces financial devastation, the courts conclude that the standard should be a financial loss that would *necessarily* impair the attorney's ability to represent his clients. The courts have been hesitant, if not unwilling, to find ineffective representation where the attorney incurs personal costs that do not rise to catastrophic levels.⁶⁶ The question has been framed not as an inquiry into an attorney's actual or probable response to the financial constraints, but as a question of the attorney's hypothetical ability to render services.

The "ruinous hardship" standard ignores the *Makemson* court's warning against emphasizing the duty of the attorney at the expense of the state's duty to provide effective assistance of counsel.⁶⁷ These courts saddle the attorney with the burden of indigent representation in cases that do not threaten the attorney's livelihood. In doing so, they place unrelenting faith in the bar's ethical obligation of zealous representation and turn a blind eye to motivational implications and financial realities of compensation. These courts assume that an attorney's ethical obligation will exact representation far beyond the services remunerated by the state and that attorneys will not dispose of the case with haste to collect the nominal compensation.⁶⁸ To the extent that these assumptions prove erroneous, these courts disregard the indigent's right to effective representation.

Courts examining the appropriate burden borne by the state have eased the attorney's burden of representation, not under a constitutional imperative, but on policy considerations of a fair distribution of the state's obligation to provide counsel to indigents.⁶⁹ These courts find the burden of representing indigents too great for the bar to bear alone because of the expanding right to counsel, the increasing criminal case load, and the growing complexity of criminal representa-

65. See, e.g., *Bias*, 568 P.2d at 1272 ("[W]here an appointed lawyer is able to maintain his regular practice . . . statutory remuneration is constitutionally sufficient."); *Randolph*, 219 N.E.2d at 340-41 (The maximum fee is "reasonable and appropriate where an appointed attorney can continue to accommodate his regular practice and business and is not compelled to assume a staggering burden and sacrifice . . .").

66. See, e.g., *Brown v. Board of County Commrs.*, 451 P.2d 708 (Nev. 1969) (The loss of several clients, forced return of retainers, and inability to meet with other clients for over two months was insufficient to meet the financial ruin standard).

67. *Makemson v. Martin County*, 491 So. 2d 1109, 1114 (Fla. 1986); *cert. denied*, 479 U.S. 1043 (1987).

68. *But see infra* notes 139-43 and accompanying text.

69. See, e.g., *State v. Green*, 470 S.W.2d 571 (Mo. 1971); *State v. Rush*, 217 A.2d 441 (N.J. 1966); *State ex rel. Partain v. Oakley*, 227 S.E.2d 314 (W.Va. 1976).

tion.⁷⁰ So finding, these courts defer to the legislature for the adoption of a less onerous system for providing counsel,⁷¹ but none suggest that the bar should be relieved of its obligation completely.⁷² Under this approach, the focus again falls on the attorneys and their burden, rather than on the accused and their right to counsel.

D. *The Failure To Address Systemic Defects*

Much of the failure to recognize the threat to effective counsel results from the manner in which these cases arise. The Sixth Amendment question reaches the court only after an attorney has devoted time far in excess of the statutory maximum, demonstrating that the indigent's defense was not compromised because of the limitation.⁷³ In both *Rush* and *Makemson*, the attorneys raised the challenge on their own behalf in collateral proceedings for compensation, not on behalf of the defendant in an appeal to overturn a conviction.⁷⁴ With effective representation rendered, a court could easily, albeit incorrectly, shift the focus from the defendant to the attorney, and deny excess compensation with an appeal to the attorney's professional and ethical obligations.

A retrospective ruling on compensation poses no direct threat to prejudice an individual defendant's representation. The effect of denying compensation in an individual case, however, reaches beyond the individual accused by shaping attorneys' expectations of future compensation. Postconviction challenges have fared no better, owing to the burdens and presumptions involved in proving ineffective representation.⁷⁵ The last, largely unexplored, possibility involves applying for prospective relief before trial or in a civil suit raising a systemic challenge to the compensation statutes.⁷⁶

70. *Green*, 470 S.W.2d at 573 (quoting *Rush*, 217 A.2d at 446); *Oakley*, 227 S.E.2d at 320-23.

71. *Green*, 470 S.W.2d at 573 (quoting *Rush*, 217 A.2d at 446); *Oakley*, 227 S.E.2d at 323. A Missouri court found the legislative response less than satisfactory and established its own temporary guidelines for supplying counsel, which included a failsafe provision to discharge the accused unable to secure counsel. *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. 1981) (en banc).

72. The courts held that the bar *alone* should not shoulder the burden. *Green*, 470 S.W.2d at 573 (quoting *Rush*, 217 A.2d at 446).

73. See, e.g., *Makemson v. Martin County*, 491 So. 2d 1109, 1111 (Fla. 1986), *cert. denied*, 479 U.S. 1043 (1987); *Postma v. Iowa Dist. Ct.*, 439 N.W.2d 179 (Iowa), *cert. denied*, 493 U.S. 918 (1989). The underlying logic is appealing as the attorney's claim for excess compensation is itself proof that the maximum had no deleterious effect on the defense. The syllogism thus created is not easily broken. To do so would require counsel diligent enough to preserve the compensation issue for appeal, but inattentive enough to not render effective assistance.

74. *Rush*, 217 A.2d at 444; *Makemson*, 491 So. 2d at 1110.

75. See *infra* notes 77-92 and accompanying text. The effect of undercompensation, often errors of omission, may not be easily identifiable on the trial record. Suzanne E. Mounts, *The Right to Counsel and the Indigent Defense System*, 14 N.Y.U. REV. L. & SOC. CHANGE 221, 222 (1986); Victoria R. Kendrick, Note, *Uncompensated Appointments of Attorneys for Indigent Criminal Defense: The Need for Supreme Court Standards*, 14 SW. U. L. REV. 389, 401 (1984).

76. Although the courts of at least two states have found prospective relief unavailable, *Peo-*

With the exception of *Rush*, courts have shied away from a broad assessment of the adequacy of indigent representation provided by undercompensated counsel and have resorted to ad hoc review. Most have found that the obligation to provide counsel may be satisfied by invoking the attorney's professional and ethical obligations. Relief is sparingly rationed on the basis of fairness to the attorney, with little attention to the operative realities for indigent representation. The remainder of this Note assesses the cost of adequate representation in capital cases and argues that maximum fees make no more than a nominal contribution toward such defenses. The Note will argue further that the burden of representation in capital cases properly rests with the state and not with individual members of the defense bar.

II. THE EFFECT OF FEE LIMITATIONS ON REPRESENTATION: AN EVALUATION

In *Strickland v. Washington*,⁷⁷ the Supreme Court created a two-tiered standard for measuring challenges of ineffective assistance. To prevail on postconviction appeal, a defendant must rebut the presumption that defense counsel's performance met an objective standard of reasonableness,⁷⁸ and then must show a reasonable probability that counsel's error prejudiced the outcome.⁷⁹ In a companion case, *United States v. Cronin*,⁸⁰ the Court reserved an exception to the presumption of competence, under circumstances where "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial."⁸¹

The recognition of a per se violation assumes special import with regard to fee limitations because of the heavy presumption that counsel's actions lie within "sound trial strategy."⁸² Fee limitations, as discussed below, inhibit the momentum of the defense by discouraging or

ple v. District Court of El Paso County, 761 P.2d 206 (Colo. 1988), *Resek v. State* 715 P.2d 1188 (Alaska Ct. App. 1986), the Eleventh Circuit held that prospective relief from a constitutionally infirm system of indigent representation may be had without a showing of inevitable prejudice. *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988). But see *Foster v. Kassulke*, 898 F.2d 1144 (6th Cir. 1990) (abstention warranted on civil rights claims pending state criminal prosecution). Some commentators have suggested that this is the most promising route to challenge systemic defects as causation may not be easily unearthed in ad hoc review. Mounts, *supra* note 75, at 223; Wilson, *supra* note 53, at 203.

77. 466 U.S. 668 (1984).

78. 466 U.S. at 687-88.

79. 466 U.S. at 694. The Eleventh Circuit has held *Strickland's* prejudice requirement inapplicable to civil suits for prospective relief under the Sixth Amendment: "[D]eficiencies that do not meet the ineffectiveness standard may nonetheless violate a defendant's rights under the sixth amendment." *Luckey v. Harris*, 860 E.2d 1012, 1017 (11th Cir. 1988).

80. 466 U.S. 648 (1984).

81. 466 U.S. at 659-60.

82. *Strickland*, 466 U.S. at 689. The Court itself has acknowledged that "*Strickland's* standard, although by no means insurmountable, is highly demanding." *Kimmelman v. Morrison*,

preventing the necessary effort.⁸³ Counsel may err by omission, and the underlying reason for omission will likely elude the trial record.⁸⁴ A reviewing court then can easily characterize counsel's omissions as those of a calculated, strategic choice rather than the product of financial constraint and disincentive.⁸⁵ Moreover, counsel's strategic choice not to pursue certain lines of investigation and theories of defense is often based on the financial constraints under which they operate.⁸⁶ *Strickland* presumes an adequate system with the possibility of individual failures; inadequate compensation and fee maxima undermine this assumption. Because the precise effect of fee limitations can rarely be proved, fee limitations can undergo meaningful Sixth Amendment review only if the system for providing indigent representation is reviewed wholesale, rather than attempting to detect its elusive effects in ad hoc review.⁸⁷ The Supreme Court recognized, somewhat unsympathetically, "the harsh reality that the quality of a criminal defendant's representation frequently may turn on his ability to retain the best counsel money can buy."⁸⁸ More recently, the Court noted that under the appointed counsel system "the quality of representation may improve when rates are increased."⁸⁹ The argument against fee limitations relies on two related premises:⁹⁰ that inadequate

477 U.S. 365, 382 (1986); see also Goodpaster, *supra* note 39, at 66 (noting the failure of the *Strickland* test to address systemic impediments to the right to counsel).

83. AMERICAN BAR ASSN., GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES 81 (1989).

84. Goodpaster, *supra* note 40, at 355; Mounts, *supra* note 75, at 222-23.

85. See, e.g., *Romero v. Lynaugh*, 884 F.2d 871, 875, 877 (5th Cir. 1989) (counsel's 29-word penalty phase presentation to the effect that "You've got that man's life in your hands. You can take it or not" might well "have been seen as a brilliant move"), *cert. denied sub nom. Romero v. Collins*, 494 U.S. 1012 (1990); *Gilliard v. Scroggy*, 847 F.2d 1141, 1144-45 (5th Cir. 1988) (pleading capital defendant guilty presumed to be a strategic choice), *cert. denied*, 488 U.S. 1019 (1989); *Stanley v. Zant*, 697 F.2d 955, 969-70 (11th Cir. 1983) (counsel's failure to present mitigating evidence at sentencing phase presumed to be a strategic choice).

86. Stephen J. Schulhofer, *Effective Assistance on the Assembly Line*, 14 N.Y.U. REV. L. & SOC. CHANGE 137, 138 (1986). See, e.g., *Washington v. Strickland*, 693 F.2d 1243, 1254 (5th Cir. Unit B 1982) (measuring reasonableness of investigation relative to the available resources), *revd. on other grounds*, 466 U.S. 668 (1984).

87. The right to effective representation at trial assumes additional consequence because of the narrowing scope of habeas review and the restricted availability of counsel. Bazelon, *Defective Assistance*, *supra* note 33, at 27. See, e.g., *Murray v. Giaratano*, 492 U.S. 1 (1989).

88. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 630 (1989) (quoting *Morris v. Slappy*, 461 U.S. 1, 23 (1983) (Brennan, J., concurring in result)). The Court added in the margin that "we cannot say that the Sixth Amendment's guarantee of effective assistance of counsel is a guarantee of a privately retained counsel in every complex case, irrespective of a defendant's ability to pay." 491 U.S. at 630 n.7.

89. *FTC v. Superior Court Trial Lawyers Assn.*, 110 S. Ct. 768, 775 (1990).

90. This Note adopts separate analyses for these intertwined propositions because of the difference in their operation. Financial constraints affect the *ability* of counsel to render effective representation; courts, therefore, have been more receptive to arguments premised on inability of counsel. See *supra* notes 64-68 and accompanying text. Financial disincentives operate to reduce the *willingness* of the attorney to provide effective representation and therefore fly in the face of the presumption of competence. See *supra* note 68 and accompanying text.

quate compensation places a financial burden on appointed counsel that impairs their *ability* to render effective representation,⁹¹ and that inadequate compensation creates motivational *disincentives* to vigorous representation.⁹²

To support the argument that fee limitations deprive indigent defendants of counsel with the ability and incentive to provide effective representation, section II.A surveys several empirical assessments of the indigent defense system. Section II.B then analyzes the manner in which fee limitations impact criminal defense efforts. Section II.C reviews the time-intensive requirements of a capital defense and compares them to the maximum fee available.

A. *Empirical Assessments of the Appointed Counsel System*

Over the past quarter century, several studies have attempted to evaluate the provision of defense services to indigent criminal defendants.⁹³ Although the survey methods and scope varied,⁹⁴ all have concluded that adequate compensation of assigned counsel is essential to effective representation of the poor.⁹⁵

91. As Justice Blackmun noted, "Appointed counsel may be inexperienced and undercompensated and, for that reason, may not have adequate opportunity or resources to deal with the special problems presented by what is likely to be a complex trial." Caplin & Drysdale, *Chartered v. United States*, 491 U.S. 617, 649 (1989) (Blackmun, J., dissenting). See REGINALD H. SMITH, *JUSTICE AND THE POOR* 113 (mem. ed. 1967); Goodpaster, *supra* note 39, at 75.

92. One study found that "[w]here the structure of the fee schedule is so rigid as to not allow for the extra effort that a particular case might require . . . [it] subtly tends to discourage expenditure of that extra effort, even among the most conscientious of counsel." GUIDELINES FOR LEGAL DEFENSE SYSTEMS, *supra* note 18, at 274; see also Bill Deatherage, Comment, *Uncompensated Appointed Counsel System: A Constitutional and Social Transgression*, 60 KY. L.J. 710, 711, 721 (1972); Sarah Grace Venable & Stephen Wells, Note, *Providing Counsel for the Indigent Accused: The Criminal Justice Act*, 12 AM. CRIM. L. REV. 789, 801, 803 (1975); Kendrick, *supra* note 75, at 408.

93. See CARLA K. GASKINS, *CRIMINAL DEFENSE SYSTEMS: A NATIONAL SURVEY* (1984); GUIDELINES FOR LEGAL DEFENSE SYSTEMS, *supra* note 18; KRANTZ et al., *supra* note 11; NORMAN LEFSTEIN, *CRIMINAL DEFENSE SERVICES FOR THE POOR: METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING* (1982); NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, *THE OTHER FACE OF JUSTICE: A REPORT OF THE NATIONAL DEFENDER SURVEY* (1973) [hereinafter *NATIONAL LEGAL AID*]; SILVERSTEIN, *supra* note 54; SPANGENBERG et al., *supra* note 14.

94. The surveys based their conclusions on evaluations solicited from judges, prosecutors and defense attorneys; some included site visits and docket studies. The older studies often focus on uncompensated, rather than undercompensated, counsel. For purposes of financial burden and motivational implications, the distinction between nominal compensation and no compensation is assumed to be insignificant. The studies also differ in scope because of the Court's incremental expansion of the right to counsel, dramatically increasing the demand for defense services between the various studies. SPANGENBERG et al., *supra* note 14, at 1-2.

95. SILVERSTEIN, *supra* note 54, at 148; NATIONAL LEGAL AID, *supra* note 93, at 53, 77; GUIDELINES FOR LEGAL DEFENSE SYSTEMS, *supra* note 18, at 142, 263, 271, 275; KRANTZ et al., *supra* note 11, at 5, 243; LEFSTEIN, *supra* note 93, at 11, 19, 25; NATIONAL ADVISORY COMM. ON CRIMINAL JUSTICE STANDARDS AND GOALS, *TASK FORCE REPORT ON THE COURTS* 60 (1973); see also Richard Klein, *Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986). Two related reports sponsored by the Bureau of Justice Statistics made no assessment of

The first effort to evaluate systems of indigent representation was the American Bar Foundation's *Defense of the Poor in Criminal Cases in American State Courts*, a two-year comprehensive study immediately on the heels of *Gideon*.⁹⁶ Amid the wide variation in functioning and effectiveness of defense systems,⁹⁷ the study found few attorneys competent to practice in criminal court,⁹⁸ and most of those who did practice received modest, if any, compensation.⁹⁹ As to effectiveness, the study noted that indigent defendants pled guilty more often¹⁰⁰ and were more likely to be sentenced to prison than defendants with privately retained counsel.¹⁰¹ Counsel found appointments to be a burdensome obligation entailing personal sacrifice,¹⁰² and many believed the system treated the indigent unfairly.¹⁰³ The study concluded that indigent defense systems faced "serious problems of financing" and required increased funding and training to attract able and competent attorneys to the defense bar.¹⁰⁴

Nearly a decade later, the National Defender Survey attempted a comprehensive national assessment of indigent defense services and published its report *The Other Face of Justice*.¹⁰⁵ The survey found that in a substantial number of jurisdictions, indigents received little more than pro forma representation.¹⁰⁶ One of the report's authors concluded, "the resources allocated to indigent defense services are grossly deficient in light of the needs of adequate and effective representation."¹⁰⁷ Although the recommendations favored state-funded public defender organizations, the survey identified adequate compensation of appointed counsel and insulation of attorneys from extrinsic financial pressures as essential to effective representation.¹⁰⁸

In 1979, the ABA Standing Committee on Legal Aid and Indigent

the adequacy of compensation for assigned counsel. GASKINS, *supra* note 93; SPANGENBERG et al., *supra* note 14.

96. SILVERSTEIN, *supra* note 54.

97. *Id.* at 34-35.

98. *Id.* at 19.

99. *Id.* at 16.

100. *Id.* at 21. The study qualifies the reliability of this finding due to the small sample size and methodological irregularities. *Id.* For a partial list of those reaching similar conclusions, see *infra* note 140.

101. SILVERSTEIN, *supra* note 54, at 25. The study's author declined to make any conclusion as to the causal link between appointed counsel and the increased incidence of guilty pleas and prison sentences. *Id.*

102. *Id.* at 16-17, 32-33, 253-67.

103. *Id.* at 33-34.

104. *Id.* at 147-48.

105. NATIONAL LEGAL AID, *supra* note 93. For a discussion of the methodological shortcomings of the survey, see SPANGENBERG et al., *supra* note 14, at 1-2.

106. NATIONAL LEGAL AID, *supra* note 93, at 77.

107. Benner, *supra* note 35, at 685.

108. NATIONAL LEGAL AID, *supra* note 93, at 77.

Defendants conducted a study, *Criminal Defense Services for the Poor*,¹⁰⁹ to assess defense services provided by state and local governments. The survey gave the most direct and critical treatment of representation afforded by undercompensated, appointed counsel. As did its predecessors, the study found that grossly inadequate funding compromised the indigent's right to counsel, denying "millions of persons" effective legal representation.¹¹⁰ With respect to appointed counsel, the study found adequate compensation indispensable, but seriously lacking.¹¹¹ Without adequate funding, competent defense attorneys would refuse to accept appointments or would shirk the additional effort necessary to provide an effective defense.¹¹²

Two government-appointed research teams, the Allen Commission and a Presidential Task Force, reached substantially similar conclusions on the necessity of adequate compensation.¹¹³ The former found that attempts "to meet the needs of the financially incapacitated accused through primary or exclusive reliance on the uncompensated services of counsel will prove unsuccessful and inadequate."¹¹⁴ The Task Force found that the "criminal process is seriously disabled by procedures which rely upon uncompensated or inadequately paid assigned counsel"¹¹⁵ Although differing on the necessary level of compensation,¹¹⁶ both groups saw inadequate compensation as a threat to the constitutional rights of the indigent accused.

Thus, the major empirical studies unanimously have concluded that inadequate funding stands as the most prominent barrier to the provision of effective assistance of counsel.¹¹⁷ The judges under whom appointed counsel serve share in this criticism of the appointed counsel system.¹¹⁸ Judge Thomas J. MacBride, Chairman of the Judicial

109. LEFSTEIN, *supra* note 93.

110. Dean Lefstein prefaced his report by stating that "[o]verall, there is abundant evidence in this report that defense services for the poor are inadequately funded. As a result, millions of persons in the United States who have a constitutional right to counsel are denied effective legal representation." *Id.* at 2.

111. *Id.* at 17.

112. *Id.* at 11, 19-20, 39, 41, 54, 56.

113. ATTORNEY GENERAL'S REPORT, *supra* note 35, at 48-49; THE TASK FORCE ON THE ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS 60-61 (1967) [hereinafter THE COURTS].

114. ATTORNEY GENERAL'S REPORT, *supra* note 35, at 48. The Allen Commission did not recommend that fees for appointed counsel be commensurate with those commanded in private practice, but did suggest that fees should be reasonably adequate. *Id.* at 49.

115. THE COURTS, *supra* note 113, at 60. The Task Force concluded that "[a]ssigned counsel should be paid a fee comparable to that which an average lawyer would receive from a paying client for performing similar services." *Id.* at 61.

116. *See supra* notes 114-15.

117. Numerous local studies have reached similar conclusions. *See Klein, supra* note 95, at 658-59 nn.189 & 191.

118. *See, e.g., Criminal Justice Act: Hearings, supra* note 23, at 232-39 (letters from federal judges criticizing compensation provisions); Greene, *supra* note 33, at 784 n.14 (Resolution of the Board of Judges finding that uncompensated counsel provided inadequate representation).

Conference Committee to Implement the Criminal Justice Act,¹¹⁹ testified on behalf of the Judicial Conference that the current "per case maximums present an immediate threat" to the indigent accused's Sixth Amendment right to counsel¹²⁰ and that inadequate compensation encourages attorneys to "cut corners," thereby depriving indigents of their constitutional rights.¹²¹ In accord, Judge David Bazelon observed that most indigents are denied effective representation¹²² because of the overwork and indifference resulting from inadequate fee structures.¹²³ "Courts simply do not pay appointed counsel enough . . . to enable them to perform effectively the myriad of tasks required of them."¹²⁴

B. *The Effect of Inadequate Compensation on Appointed Counsel*

As previously mentioned, the failure to provide adequate compensation lowers the quality of indigent representation in two important respects. It places financial burdens on the attorney that limit the ability to render effective representation. The attorney must choose between the ethical obligation of zealous representation¹²⁵ and personal financial hardship.¹²⁶ Inadequate compensation also reduces the financial incentives to accept appointed cases, and once appointed, to vigorously represent the indigent defendant. As King Lear scolded the fool for giving him nothing, the fool retorted "'tis like the breath of an unfee'd lawyer, you gave me nothing for 't."¹²⁷

119. The Criminal Justice Act, 18 U.S.C. § 3006A (1988), is the federal analogue of state compensation statutes. Its provisions are more generous than those of most states. See *supra* note 23.

120. *Criminal Justice Act: Hearings*, *supra* note 23, at 24 (statement of Judge Thomas J. MacBride, Chairman of the Judicial Conference Committee to Implement the Criminal Justice Act).

121. *Criminal Justice Act Revision of 1985: Hearing on H.R. 3004 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 17 (1985) [hereinafter *Criminal Justice Act Revision of 1985: Hearing*] (statement of Judge Thomas J. MacBride).

122. Bazelon, *Defective Assistance*, *supra* note 33, at 2.

123. Bazelon, *Realities*, *supra* note 33, at 813, 818, 835.

124. *Id.* at 813. Judge Bazelon noted that statutory limitations on payments seriously undercompensate an attorney appointed to a difficult defense. Bazelon, *Defective Assistance*, *supra* note 33, at 9.

125. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980). Inadequate compensation demands that attorneys disregard the approved standards of representation. LEFSTEIN, *supra* note 93, at 57.

126. See Newton R. Bradley, *Representation of the Indigent Accused of Crime from the Viewpoint of Court Appointed Counsel*, 29 MO. L. REV. 328, 336 (1964). The Model Rules resolve this dilemma by allowing an attorney to withdraw from representation that would involve an unreasonable financial burden. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2(b) (1983). Whether courts will allow withdrawal on this ground is unclear. Cf. *Haggins v. State*, 498 So. 2d 953 (Fla. Dist. Ct. App. 1986) (denying public defender's motion to withdraw because of inadequate resources).

127. WILLIAM SHAKESPEARE, *KING LEAR* act 1, sc. 4, lines 142-43 (George L. Kittredge ed., Ginn. & Co. 1940).

The costs of inadequate compensation borne by appointed counsel are twofold. First, the attorney forgoes the income to be received in the ordinary course of private practice. In particularly complex and protracted litigation, lost income may reach a substantial portion of annual earnings.¹²⁸ Second, the attorney may incur substantial overhead costs associated with legal practice that exceed the fee maximum.¹²⁹ The attorney therefore loses money by accepting appointments, paying overhead expenses from personal funds.¹³⁰ Attorneys may protect their own financial well-being at the expense of the client's right to effective counsel.¹³¹

The appointed counsel system has been roundly criticized for its failure to attract qualified counsel and its reliance on younger, inexperienced attorneys to represent indigent defendants.¹³² Undercompensation discourages seasoned attorneys from accepting appointments¹³³ and leaves the lion's share of appointed cases to be divided among either young attorneys eager to gain trial experience¹³⁴ or incompetent

128. See, e.g., *GIDEON UNDONE*, *supra* note 35, at 15 (attorney spent 650 hours, half of his annual billable hours, defending an indigent); *People v. Randolph*, 219 N.E.2d 337, 339-40 (Ill. 1966) (although fees limited to \$250 per defendant, attorneys invested \$31,000 in time and expenses during the first nine weeks of a murder trial); *Criminal Justice Act: Hearings*, *supra* note 23, at 293 (statement of Lionel Barrett) (attorney invested three and one half months in appointed case).

129. See *GIDEON UNDONE*, *supra* note 35, at 3, 6, 15; *LEFSTEIN*, *supra* note 93, at 20-23. The overhead associated with practicing law has been estimated at forty percent of revenue. *LAW OFFICE ECONOMICS & MANAGEMENT MANUAL*, §§ 27.01, 54.01 (1986); *Criminal Justice Act: Hearings*, *supra* note 23, at 22 (statement of Judge Thomas J. MacBride).

130. *Criminal Justice Act: Hearings*, *supra* note 23, at 24 (statement of Judge Thomas J. MacBride).

131. See, e.g., *In re Hunoval*, 247 S.E.2d 230, 231 (N.C. 1977) (appointed counsel refused to file a petition for certiorari on behalf of client convicted of a capital offense, stating he was "not an eleemosynary institution" and could not justify working "at a rate less than that received by a garage mechanic"); *In re Dale*, 247 S.E.2d 246, 248 (N.C. Ct. App. 1978) (appointed counsel failed to perfect an appeal for client convicted of a capital offense, "placing [his] priority on living" rather than on representing his client); *State v. Pelfrey*, 256 S.E.2d 438, 440 (W. Va. 1979) (appointed counsel failed to move for mistrial solely because of personal economic motivation); see also *Bazon, Realities*, *supra* note 33, at 813.

132. See, e.g., *Criminal Justice Act: Hearings*, *supra* note 23, at 25 (statement of Judge Thomas J. MacBride) ("[The] exodus of qualified counsel will . . . result in 'the nation's poor becoming the 'guinea pigs' of the young, inexperienced, or marginal lawyers.'"); *ATTORNEY GENERAL'S REPORT*, *supra* note 35, at 10; *Bazon, Realities*, *supra* note 33; *Bazon, Defective Assistance*, *supra* note 33; *Burger*, *supra* note 33, at 238; *GIDEON UNDONE*, *supra* note 35, at 15; *GUIDELINES FOR LEGAL DEFENSE SYSTEMS*, *supra* note 18, at 139; Tom Wicker, *Defending the Indigent in Capital Cases*, 2 CRIM. JUST. ETHICS 2, 2 (1983).

133. Justice Blackmun commented that "even the best-intentioned of attorneys may have no choice but to decline the task of representing defendants in cases for which they will not receive adequate compensation." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 646 (1989) (Blackmun, J., dissenting); see *AMERICAN BAR ASSN.*, *supra* note 83, at 79-80. Fifty-six percent of the federal district judges surveyed found that inadequate compensation hindered their ability to secure experienced, competent counsel for indigents. *Criminal Justice Act: Hearings*, *supra* note 23, at 140 (Letter of Theodore J. Lidz); see also *Criminal Justice Act Revision of 1985: Hearing*, *supra* note 121, at 55-56 (statement of the Federal Public and Community Defenders).

134. *Argersinger v. Hamlin*, 407 U.S. 25, 57 n.21 (1972) (Powell, J., concurring in result) (Because of the low rate of compensation, "the majority of persons willing to accept appoint-

attorneys aptly characterized as "walking violations of the sixth amendment."¹³⁵ Young attorneys are hampered by their unfamiliarity with trial practice, criminal procedure, and the courts.¹³⁶ The second category of appointed counsel, often referred to as "the regulars," maintain their practice on a high volume of appointed cases.¹³⁷ Their financial success depends on disposing of cases with a minimal investment of time and effort.¹³⁸ The indigent defendant therefore enters the criminal justice system disadvantaged by having inexperienced or incompetent counsel.

The handicap of inexperienced counsel is compounded by the disincentives to vigorous representation inherent in the fee maximum.¹³⁹ This disincentive manifests itself most strikingly in the propensity of appointed counsel to encourage their clients to plead guilty to avoid the expense of trial.¹⁴⁰ More subtly, inadequate compensation contributes to attorneys' indifference and occasional resentment toward court appointments.¹⁴¹ Although damaging to a client's defense, indifference almost always will evade a judicial review of effective assistance.¹⁴² In its more overt form, this indifference may include failure

ments are the young and inexperienced."); SILVERSTEIN, *supra* note 54, at 15-16; NATIONAL LEGAL AID, *supra* note 93, at 44-45.

135. Bazelon, *Defective Assistance*, *supra* note 33, at 2.

136. *See id.* at 12-13; GUIDELINES FOR LEGAL DEFENSE SYSTEMS, *supra* note 18, at 139.

137. *See, eg.* FTC v. Superior Court Trial Lawyers Assn., 110 S. Ct. 768, 771 (1990).

138. Bazelon, *Defective Assistance*, *supra* note 33, at 9. Service provided by regulars has been labeled second-class representation, bearing little resemblance to the services afforded paying clients. Penny J. White, *A Noble Idea Whose Time Has Come*, 18 MEM. ST. U. L. REV. 223, 258-62 (1989).

139. *See supra* note 92. Appointed counsel "cut corners and they don't explore all the possible answers that could be given to an indigent defendant," depriving indigents of their constitutional rights. *Criminal Justice Act: Hearings*, *supra* note 23, at 10, 25 (statement of Judge Thomas J. MacBride); *Criminal Justice Act Revision of 1985: Hearing*, *supra* note 121, at 17 (statement of Judge Thomas J. MacBride).

140. Justice Blackmun observed that "[f]acing a lengthy trial against a better armed adversary, the temptation to recommend a guilty plea will be great." *United States v. Monsanto*, 491 U.S. 600, 649 (1989) (Blackmun, J., dissenting). *See, e.g.*, *Walker v. Caldwell*, 476 F.2d 213, 215 (5th Cir. 1973) (counsel pled client guilty without investigation or informing client of legal consequences, and admitted "that he follows a substantially different practice when representing fee clients rather than appointed clients"); *McLaughlin v. Royster*, 346 F. Supp. 297 (E.D. Va. 1972) (appointed counsel pled defendant guilty without investigation, and admitted that he would have proceeded differently if paid to defend client); *see also* ATTORNEY GENERAL'S REPORT, *supra* note 35, at 29-31; GIDEON UNDONE, *supra* note 35, at 1; GUIDELINES FOR LEGAL DEFENSE SYSTEMS, *supra* note 18, at 264; KRANTZ et al., *supra* note 11, at 235; Albert W. Alschuler, *Personal Failure, Institutional Failure, and the Sixth Amendment*, 14 N.Y.U. REV. L. & SOC. CHANGE 149, 150 (1986); Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975); Bazelon, *Defective Assistance*, *supra* note 33, at 11, 16; Bazelon, *Realities*, *supra* note 33, at 813; Benner, *supra* note 35, at 684; Goodpaster, *supra* note 39, at 72-73; Klein, *supra* note 95, at 672.

141. Bazelon, *Realities*, *supra* note 33, at 818; Hunter, *supra* note 33, at 8; David L. Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735, 782, 789 (1980).

142. *See* Mounts, *supra* note 75, at 222-23; Kendrick, *supra* note 75, at 401.

to investigate adequately the facts and research the relevant law.¹⁴³ The damaging effect of the fee maximums can be illustrated most effectively against the backdrop of a capital case in which the necessary preparation is monumental and the attorney's skill is critical to the outcome.

C. *The Requirements of an Effective Capital Defense*

The defense of a capital case is perhaps the most technically difficult form of litigation known to the American legal system.¹⁴⁴ The extraordinary stakes — the client's life — and the complexity of the case demand the highest order of zeal and competence.¹⁴⁵

The complexity of capital litigation owes to several factors peculiar to the imposition of the death penalty. Representation of a capital defendant requires extraordinary investigation and preparation.¹⁴⁶ The investigation underpinning a capital defense is estimated to be three to five times longer than that of a noncapital trial, sometimes spanning two years.¹⁴⁷ The attorney must fully investigate the circumstances of the crime and conduct a complete investigation of the de-

143. See AMERICAN BAR ASSN., *supra* note 83, at 79-80 (36% of attorneys in a Massachusetts survey admitted that they omitted some appropriate defense activity because of inadequate compensation); Bazelon, *Defective Assistance*, *supra* note 33, at 10; White, *supra* note 138, at 252; *Criminal Justice Act: Hearings*, *supra* note 23, at 77 (statement of Samuel Skinner).

Compensation directly affects the amount of effort attorneys are willing to invest in cases. LEFSTEIN, *supra* note 93, at 19, 39, 41, 54; GIDEON UNDONE, *supra* note 35, at 6.

144. *Murray v. Giarratano*, 491 U.S. 1, 27-28 (1989) (Stevens, J., dissenting). See SOUTHERN PRISONERS' DEFENSE COMM., DEFENDING A CAPITAL CASE IN ALABAMA 1 (1988) [hereinafter DEFENDING A CAPITAL CASE IN ALABAMA] (citing as factors the need for extensive pretrial investigation and preparation, unique sentencing phase, and rapidly developing law); Barry Nakell, *The Cost of the Death Penalty*, in THE DEATH PENALTY IN AMERICA 241-43 (3d ed. 1982); see also 1 CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE & CALIFORNIA PUBLIC DEFENDERS ASSN., CALIFORNIA DEATH PENALTY DEFENSE MANUAL A-7 & n.1 (1986) [hereinafter CALIFORNIA DEFENSE MANUAL]; SOUTHERN POVERTY LAW CENTER, TRIAL OF THE PENALTY PHASE 1 (1981) [hereinafter TRIAL OF THE PENALTY PHASE].

145. The Supreme Court has recognized that "extraordinary measures" are necessary to ensure the reliability of decisions in capital cases, owing to the exceptional and irrevocable nature of the penalty. *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982); *Gardener v. Florida*, 430 U.S. 349, 357 (1977); *Woodson v. North Carolina* 428 U.S. 280 (1976).

As Justice Marshall has noted, "defense counsel will reasonably exhaust every possible means to save his client from execution." *Furman v. Georgia*, 408 U.S. 238, 358 (1972) (Marshall, J., concurring). See Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980).

146. The preparation of a case requires hundreds of hours of fact investigation and legal research, scientific analysis of a large volume of evidence and evaluation of the defendant's social and mental history. DEFENDING A CAPITAL CASE IN ALABAMA, *supra* note 144, at 7; see also GIDEON UNDONE, *supra* note 35, at 14 (remarks of Randall M. Dana) (estimating that trial preparation for a capital case averages eight hundred hours). The burden is so weighty that some have suggested that two attorneys alone cannot competently represent a capital defendant. DEFENDING A CAPITAL CASE IN ALABAMA, *supra* note 144, at 7; see also TRIAL OF THE PENALTY PHASE, *supra* note 144, at 4.

147. Margot Garey, Comment, *The Cost of Taking A Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221, 1252 (1985).

fendant's entire life.¹⁴⁸ Often the only hope of victory is for a sentence less than death.¹⁴⁹ The investigation for the penalty phase of the trial therefore must assume primary importance in the defense, shaping all strategic choices throughout the defense, rather than being relegated to an afterthought in the event of a guilty verdict.¹⁵⁰ An attorney must devote "extraordinary diligence" to become familiar with the life and character of the accused.¹⁵¹

In addition to a thorough and complete grasp of the underlying facts, a capital defense attorney must be familiar with a vast, evolving body of law. As death penalty cases merit extraordinary constitutional protection,¹⁵² the boundaries on the conduct of capital cases undergo constant revision.¹⁵³ The defense attorney must be familiar with all cases decided by and pending in the Supreme Court and other federal courts.¹⁵⁴ The capital case requires exceptional vigilance in raising and preserving "numerous important and highly technical death penalty issues . . . with which [nonspecialists] have no familiarity."¹⁵⁵

A related peculiarity of capital defense lies in the extensive and intricate use of pretrial motions.¹⁵⁶ A typical capital case requires ten

148. The "consideration of the character and record of the individual offender [is] a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). The requisite investigation may take several months and must follow the defendant wherever he spent his life. *DEFENDING A CAPITAL CASE IN ALABAMA*, *supra* note 144, at 336; 1 *CALIFORNIA DEFENSE MANUAL*, *supra* note 144, at B-62. *TRIAL OF THE PENALTY PHASE*, *supra* note 144, at 13-14. The investigation may include events over the past 20 to 40 years. *Garey*, *supra* note 147, at 1251.

The right to effective assistance of counsel extends to the sentencing phase of a capital trial. *Gardener v. Florida*, 430 U.S. 349, 358 (1977) (Stevens, J., plurality opinion). Reviewing courts have been willing to find ineffectiveness where counsel failed to investigate and present mitigating evidence in the penalty phase. *See, e.g., Middleton v. Dugger*, 849 F.2d 491 (11th Cir. 1987) (failure to investigate defendant's background); *Stephens v. Kemp*, 846 F.2d 642 (11th Cir. 1988) (failure to investigate mental history). Some, however, have framed counsel's failure as a strategic choice. *See supra* note 85 and accompanying text.

149. *See DEFENDING A CAPITAL CASE IN ALABAMA*, *supra* note 144, at 334; *TRIAL OF THE PENALTY PHASE*, *supra* note 144, at 1-2.

150. *TRIAL OF THE PENALTY PHASE*, *supra* note 144, at 1-5.

151. *DEFENDING A CAPITAL CASE IN ALABAMA*, *supra* note 144, at 5.

152. *See supra* note 145.

153. *DEFENDING A CAPITAL CASE IN ALABAMA*, *supra* note 144, at 1. "[T]his Court's death penalty jurisprudence unquestionably is difficult even for a trained lawyer to master." *Murray v. Giarratano*, 492 U.S. 1, 28 (1989) (Stevens, J., dissenting). One litigator commented, "No case I have ever handled compares in complexity with my Florida death penalty case. The death penalty jurisprudence is unintelligible; it is inconsistent and, at times, irrational." *THE SPANGENBERG GROUP, A CASELOAD/WORKLOAD FORMULA FOR FLORIDA'S OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE* 12 (1987).

154. *DEFENDING A CAPITAL CASE IN ALABAMA*, *supra* note 144, at 1; *see also Burger*, *supra* note 33, at 233.

155. *DEFENDING A CAPITAL CASE IN ALABAMA*, *supra* note 144, at 3, 13-17. Due to the rapidly evolving nature of the law, no issues are frivolous and all must be preserved. "A losing issue today could be a winner tomorrow." *Id.* at 1.

156. As noted by one study, "[m]otions create a record and set a course of strategy upon which the entire litigation effort in a capital case is patterned." *NEW YORK STATE DEFENDERS ASSN., CAPITAL LOSSES: THE PRICE OF THE DEATH PENALTY FOR NEW YORK STATE* 12

to twenty-five motions, each of which must be researched and litigated with greater care and thoroughness than in a noncapital defense.¹⁵⁷ Although some will bear similarity to routine criminal motion practice, such as a motion to suppress evidence, many will turn on the intricacies of the constitutional protections afforded capital defendants.¹⁵⁸ Not only must the defense file motions tailored to the specific defendant, it must raise objections to all the potential systemic defects of the capital punishment process.¹⁵⁹ This includes challenges to the particular capital punishment statute, the method of selection and composition of the petit and grand juries, and the indictment procedure.¹⁶⁰ Also, a series of motions must be filed to protect the defendant against prejudicial publicity¹⁶¹ and from the infection of jury bias during voir dire.¹⁶² The defense must move to retain expert assistance, including investigators, forensic scientists, psychological and psychiatric experts, and juristic psychologists.¹⁶³ Each motion requires substantial investigation and research as well as litigation before the trial judge.¹⁶⁴ The success of each motion may determine the outcome of the trial as well as establish a record on which higher courts may review conviction and sentencing.

The capital trial opens with procedural and substantive complexities well beyond those in traditional criminal defense cases. Jury selection criteria include a broader range of issues, and the selection process has been estimated to take 5.3 times longer than ordinary se-

(1982) [hereinafter CAPITAL LOSSES]; see also 1 CALIFORNIA DEFENSE MANUAL, *supra* note 144, at D-1 to D-9.

157. SOUTHERN POVERTY LAW CENTER, MOTIONS FOR CAPITAL CASES 5-7 (Dennis N. Balske ed. 1981) [hereinafter MOTIONS FOR CAPITAL CASES]; see also 1 CALIFORNIA DEFENSE MANUAL, *supra* note 144, at A-3; Garey, *supra* note 147, at 1248.

158. Robert L. Spangenberg & Elizabeth R. Walsh, *Capital Punishment or Life Imprisonment?: Some Cost Considerations*, 23 LOY. L.A. L. REV. 45, 50 (1989); see also THE SPANGENBERG GROUP, *supra* note 153, at 10 ("Such motions are not only routine in capital cases but are also required for defense counsel to meet their ethical responsibilities.").

159. See CAPITAL LOSSES, *supra* note 156, at 12-13. Because of the evolving constitutional protections, a defense attorney must take issue with and litigate any aspect of the capital procedure that she believes unfair. See DEFENDING A CAPITAL CASE IN ALABAMA, *supra* note 144, at 10; Garey, *supra* note 147, at 1255.

160. See 3 ANTHONY G. AMSTERDAM, TRIAL MANUAL 4 FOR THE DEFENSE OF CRIMINAL CASES § 4 (1984); DEFENDING A CAPITAL CASE IN ALABAMA, *supra* note 144, at 86-91, 164-71; MOTIONS FOR CAPITAL CASES, *supra* note 157, at 6.

161. DEFENDING A CAPITAL CASE IN ALABAMA, *supra* note 144, at 233-39; cf. MOTIONS FOR CAPITAL CASES, *supra* note 157, at 5-7.

162. 1 NATIONAL JURY PROJECT, JURYWORK: SYSTEMATIC TECHNIQUES, §§ 3.01, 3.06[1] (2d ed. 1989); see also Dennis N. Balske, *New Strategies for the Defense of Capital Cases*, 13 AKRON L. REV. 331, 341 (1979) (sequestered voir dire is critical in a capital case).

163. The Sixth Amendment right to counsel includes access to expert assistance, but defense counsel must establish the need for such assistance before a court is required to provide funds. *Ake v. Oklahoma*, 470 U.S. 68 (1985); *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980). See generally 1 AMSTERDAM, *supra* note 160, at § 299.

164. CAPITAL LOSSES, *supra* note 156, at 12-13.

lection, sometimes lasting up to two months.¹⁶⁵ On voir dire, potential jurors must be examined individually to identify any prejudice that may have arisen from the pretrial publicity common to capital trials.¹⁶⁶ Voir dire also includes the "death qualification" of the jurors, exploring their personal beliefs and ability to impose the death penalty.¹⁶⁷ Defense attorneys must exercise special care in framing their inquiry, as voir dire can shape the jurors' attitudes toward the defendant and their propensity to impose a death sentence.¹⁶⁸ Attorneys also must attempt to convince the trial judge to restrict the form of qualification by demonstrating the prejudicial effects of death qualification procedures.¹⁶⁹ Selection can be further complicated and lengthened by state procedures requiring larger jury panels and the selection of two juries, one to determine guilt and another to recommend a sentence.¹⁷⁰

The actual trial of a capital case takes on average 3.5 times longer than a noncapital murder case and lasts an average of thirty days.¹⁷¹ The trial alone consumes between 850 and 1000 hours of the attorney's time.¹⁷² The evidence usually involves a larger number of witnesses and an increased use of expert testimony.¹⁷³ The issues to be heard are more complex and the procedural safeguards to be invoked are more rigorous.¹⁷⁴ Much of the additional time is due to the bifurcated proceedings in which a defendant found guilty is afforded a separate trial to determine the propriety of a death sentence.¹⁷⁵

Unlike any other judicial proceeding, the penalty phase of a capital trial raises unique issues of strategy, evidence, and preparation.¹⁷⁶ The

165. Spangenberg & Walsh, *supra* note 158, at 51-52; CALIFORNIA DEFENSE MANUAL, *supra* note 144, at E-7; Garey, *supra* note 147, at 1257.

166. CAPITAL LOSSES, *supra* note 156, at 16-17.

167. Spangenberg & Walsh, *supra* note 158, at 51. Once a prospective juror expresses opposition to the death penalty, the defense attorney must attempt to save her from challenge for cause by eliciting testimony that her beliefs will not interfere with the discharge of her jury duties. NATIONAL JURY PROJECT, *supra* note 162, at 10.03[8][a][i].

168. Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death Qualification Process*, 8 LAW & HUM. BEHAV. 121, 128 (1984); Craig Haney, *Examining Death Qualification: Further Analysis of the Process Effect*, 8 LAW & HUM. BEHAV. 133, 151 (1984); see also NATIONAL JURY PROJECT, *supra* note 162, at § 3.03[3][c]; EMILY DE FALLA ET AL., CAPITAL TRIALS: JUROR ATTITUDES AND SELECTION STRATEGIES i (1984).

169. NATIONAL JURY PROJECT, *supra* note 162, at § 3.01. Success at trial on this issue is critical due to the unwillingness of higher courts to review for bias infused during the death qualification process. See *Lockhart v. McCree*, 476 U.S. 162 (1986).

170. Spangenberg & Walsh, *supra* note 158 at 51-52; Garey, *supra* note 147, at 1256.

171. Spangenberg & Walsh, *supra* note 158, at 53; Garey, *supra* note 147, at 1258.

172. Spangenberg & Walsh, *supra* note 158, at 53.

173. Garey, *supra* note 147, at 1252, 1258-59. See CAPITAL LOSSES, *supra* note 156, at 13-18; AMERICAN BAR ASSN., *supra* note 83.

174. See Nakell, *supra* note 144, at 242-43.

175. See Spangenberg & Walsh, *supra* note 158, at 52.

176. TRIAL OF THE PENALTY PHASE, *supra* note 144, at 1. See generally Dennis N. Balske, *The Penalty-Phase Trial*, in 2 CALIFORNIA DEFENSE MANUAL, *supra* note 144, at H-6 to H-13.

rules of evidence are relaxed¹⁷⁷ and the scope of relevant inquiry is dramatically expanded.¹⁷⁸ The defense assumes an affirmative role,¹⁷⁹ trying to convince the jury that the defendant deserves to live. Although strategies must be tailored to the particular defendant, two basic tactics usually surface: humanizing the defendant and presenting a general case against execution.¹⁸⁰ Humanizing the client requires research into personal history from birth to trial, interviewing family, neighbors, teachers, ministers, employers and anyone with significant contact with the defendant.¹⁸¹ These witnesses must be presented to the jury to tell the defendant's story, to make sense of the client's life and to explain how he came to commit the crime.¹⁸² Law enforcement officers, witnesses to executions, ministers and experts on the deterrent effect all may be used to pose an attack on the penalty itself, to convince the jury that its imposition is improper.¹⁸³ The penalty phase is another complete trial, often of superior importance given the frequently overwhelming evidence of guilt.¹⁸⁴ It requires attention to the entire life of a defendant and allows the defense to take the offensive. The task of arguing for life is monumental.

In summary, representing a defendant against the possibility of death raises problems unknown to traditional criminal defense practice. The factual inquiry and the necessary legal preparation are enormous. Trial preparation requires hundreds of hours of research and investigation over several months.¹⁸⁵ The trial alone can monopolize the attorney's practice for an entire month. One admittedly modest estimate placed the attorney cost for a capital defense at \$106,350.¹⁸⁶ A statutory fee provision that allows for fifty hours of representation provides little more than a token contribution to an adequate defense. The preceding analysis can place no firm dollar figure on capital litigation,¹⁸⁷ nor does it exhaustively detail the necessary elements of an

177. See, e.g., *Green v. Georgia*, 442 U.S. 95 (1979).

178. *Lockett v. Ohio*, 438 U.S. 586, 608 (1978); *Gregg v. Georgia*, 428 U.S. 153, 204 (1976).

179. Goodpaster, *supra* note 40, at 335.

180. TRIAL OF THE PENALTY PHASE, *supra* note 144, at 11-21.

181. 3 AMSTERDAM, *supra* note 160, at § 468-A(F).

182. TRIAL OF THE PENALTY PHASE, *supra* note 144, at 13-16; DE FALLA et al., *supra* note 168, at 7.

183. TRIAL OF THE PENALTY PHASE, *supra* note 144, at 16-21.

184. DEFENDING A CAPITAL CASE IN ALABAMA, *supra* note 144, at 334; see TRIAL OF THE PENALTY PHASE, *supra* note 144, at 1.

185. See *supra* note 128. Effective representation requires more extensive preparation than the average appointed counsel can afford to provide. Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1434 (1965).

186. CAPITAL LOSSES, *supra* note 156, at 18 & n.48; see also Garey, *supra* note 147, at 1258, 1261; Spangenberg & Walsh, *supra* note 158, at 53.

187. Indeed, arriving at an estimate for the cost of effective representation would prove difficult. Since most appointed counsel and public defenders operate under severe financial constraints, the time they would invest in effective representation of capital defendants could be discerned only if those constraints were lifted.

effective capital defense. This brief sketch of capital litigation, however, demonstrates that fee maxima, by any reasonable estimate, exacerbate the problems inherent in already inadequate fee schedules. To ask attorneys to invest one thousand hours of billable time for which they will receive no more than one thousand dollars cannot but endanger the client's right to effective representation.

III. CONFUSING THE ATTORNEY'S AND THE STATE'S OBLIGATIONS

Courts rejecting constitutional challenges to undercompensated appointments place great emphasis on the attorneys' duty as officers of the court and their ethical obligation to perform pro bono public service. Under this reasoning, the state owes the defendant meaningful access to counsel,¹⁸⁸ and attorneys must serve at the direction of the court.¹⁸⁹ Courts may therefore direct attorneys to fulfill the state's obligation to indigent defendants.¹⁹⁰ Although admitting the independent force of these obligations,¹⁹¹ this Part argues that piggybacking these duties is improper, misplacing the burden of indigent defense on the private practitioner¹⁹² and losing sight of the primary concern of effective representation.¹⁹³ This Part acknowledges that at-

188. See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

189. The Supreme Court held that "[a]ttorneys are officers of the court, and are bound to render service when required by such an appointment." *Powell v. Alabama*, 287 U.S. 45, 73 (1932).

190. On the relationship of the attorney's obligation and the defendant's right to counsel, Justice White commented: "I discern nothing in the Sixth Amendment that would prohibit a State from requiring its lawyers to represent indigent criminal defendants without *any* compensation for their services at all." *Martin County v. Makemson*, 479 U.S. 1043, 1045 (1987) (White, J., dissenting from denial of certiorari). Courts regularly have followed the logic that the attorney's duty to the court and to the public satisfies the state's obligation to provide counsel to indigent defendants. See, e.g., *Williamson v. Vardeman*, 674 F.2d 1211, 1214-15 (8th Cir. 1982); *Unites States v. Dillon*, 346 F.2d 633, 635 (9th Cir. 1965); *Sparks v. Parker*, 368 So. 2d 528, 532 (Ala. 1979); *Resek v. State*, 715 P.2d 1188, 1191 (Alaska Ct. App. 1986); *State v. Allen*, 611 P.2d 605, 608 (Kan. Ct. App. 1980).

191. The pro bono obligation derives from the attorney's oath on admission to the bar and the ethical obligations ascribed to the bar. See, e.g., WASH. REV. CODE ANN. § 2.48.210 (West 1988); MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25 (1980).

An attorney's obligation to the court derives from the court's inherent power to regulate its participants. See *Powell v. Alabama*, 287 U.S. at 73 ("The duty of the trial court to appoint counsel under such circumstances is clear, . . . and its power to do so, even in the absence of a statute, cannot be questioned."); *Mallard v. United States Dist. Court*, 490 U.S. 296, 312-13 (1989) (Stevens, J., dissenting) ("[A] court's power to require a lawyer to render assistance to the indigent is firmly rooted in the authority to define the terms and conditions upon which members are admitted to the bar, and to exercise 'those powers necessary to protect the functioning of its own processes.'" (quoting *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 821 (1987) (Scalia, J., concurring in judgment)) (footnote and citations omitted)).

192. See AMERICAN BAR ASSN., *supra* note 83, at 79-80.

193. See *Wilson*, *supra* note 53, at 206. If the analysis of the preceding section is accepted, the question of burden need not be reached because undercompensated attorneys are financially incapable of adequately representing the indigent defendant regardless of ethical commitment.

torneys can be compelled to serve at the behest of the court but contends that the state, and not the private bar, should bear the cost of such service. The cost of indigent representation is a price of the efficient functioning of the criminal justice system,¹⁹⁴ a cost properly borne by the society that created it and benefits from it.¹⁹⁵ Section III.A traces the sources of the professional obligations upon which courts placed the burden of representing indigents. Section III.B then turns to the question of who should bear the cost of the *Gideon* mandate.

A. *The Legal Force of the Professional and Ethical Obligations*

The Supreme Court has yet to reach the question whether courts may require attorneys to serve without compensation.¹⁹⁶ The Court, however, endorsed recent scholarship casting doubt on the historical foundations of coerced representation¹⁹⁷ and noted the "complete absence of precedent evincing state courts' power to sanction attorneys unwilling to provide free representation."¹⁹⁸ Nevertheless, substantial case law acknowledges the duty to accept unpaid appointments as a concomitant element of membership in the bar.¹⁹⁹ Traditional legal

Should courts properly be able to shift the burden of indigent representation, the invocation of the bar's obligation does not absolve the state of its obligation to provide counsel where the bar fails to meet its responsibility.

194. SPANGENBERG et al., *supra* note 14, at 1; Shapiro, *supra* note 141, at 780. A Presidential Task Force found that "[t]he criminal process is seriously disabled by procedures which rely upon uncompensated or inadequately paid assigned counsel." THE COURTS, *supra* note 113, at 60.

195. "Government has the responsibility to provide adequate funding for legal representation of all eligible persons . . ." AMERICAN BAR ASSN., STANDARDS FOR CRIMINAL JUSTICE § 5-1.5 (1980); see also EMERY A. BROWNELL, LEGAL AID IN THE UNITED STATES 241 (1951) (criminal defense is clearly a public function); LEFSTEIN, *supra* note 93, at 59 ("Adequate funding of defense programs is an unavoidable obligation."); THE COURTS, *supra* note 113, at 61 (rejecting reliance on an ethical obligation); Charles Fried, *Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship*, 85 YALE L.J. 1060 (1976) (indigent representation is society's obligation).

196. *Mallard v. United States Dist. Court*, 490 U.S. 296, 308 n.8 (1989). Dicta in *Mallard* suggests that the Court might find a professional obligation of indigent defense for attorneys as officers of the court. The four dissenters grounded their argument on such a duty. 490 U.S. at 312-13 (Stevens, J., dissenting). In addition, Justice Kennedy qualified his opinion with a recognition of attorneys' "obligations by virtue of their special status as officers of the court." 490 U.S. at 310-11 (Kennedy, J., concurring); see also *FTC v. Superior Court Trial Lawyers Assn.*, 110 S. Ct. 768, 791 (1990) (Blackmun, J., concurring in part and dissenting in part) (The attorney's "duty to serve the public by representing indigent defendants is not only a matter of conscience, but is also enforceable by the government's power to order such representation, either as a condition of practicing law . . . or on pain of contempt.").

197. *Mallard*, 490 U.S. at 304 ("To justify coerced, uncompensated legal services on the basis of a firm tradition in England and the United States is to read into that tradition a story that is not there.") (citing Shapiro, *supra* note 141, at 753).

198. 490 U.S. at 304 n.4.

199. See *United States v. Dillon*, 346 F.2d 633, 635 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966). Then-Judge Cardozo proclaimed for the New York Court of Appeals: "'Membership in the bar is a privilege burdened with conditions.' The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the

scholarship followed similar reasoning in divining a professional duty to accept appointments absent compensation.²⁰⁰ The duty can be attributed either to the inherent power of the court to direct its officers²⁰¹ or to a condition of entry into a state-created monopoly over which the courts have ultimate control.²⁰²

Whether an inherent power of the court or an incident of licensure to practice law, the rationale for compelled service is the maintenance of the integrity of the legal system. Without power to compel the service of attorneys, the wheels of justice might grind to a halt as courts unable to honor a defendant's right to counsel could not proceed against him.²⁰³ Compelled service allows courts a stopgap measure to continue functioning when the state fails to meet its obligation to provide indigent defense.²⁰⁴ However unavoidable the occasional uncompensated appointment may be, the attorney's obligation does not encompass a complete assumption of the state's obligation to the indigent defendant. The difference is a critical one. An occasional uncompensated appointment may pose only a small and infrequent burden on the attorney and do little to shape the expectations of the bar toward appointments. The regular, wholesale shifting of the state's burden of representation onto the bar may do great violence to the attorney's ethical commitment and willingness to render zealous representation without compensation.

The courts' references to the attorney's obligation to perform pro bono service stand on tenuous footing. The American Bar Association's ethical guidelines establish an aspirational goal for attorneys to render pro bono service, but provide no requirements of such.²⁰⁵ The ABA expressly rejected a proposal that would require attorneys to provide forty hours pro bono service annually.²⁰⁶ Even if the bar were to adopt a mandatory requirement, it surely would not approach the

court itself, an instrument or agency to advance the ends of justice." *People ex rel. Karlin v. Culkin*, 162 N.E. 487, 489 (N.Y. 1928).

But see *Webb v. Baird*, 6 Ind. 13, 16-17 (1854), quoted in *Shapiro*, *supra* note 141, at 761-62 (The legal profession has been "properly stripped of all its odious distinctions and peculiar emoluments."). Accord *DeLisio v. Alaska Superior Court*, 740 P.2d 437, 440-42 (Alaska 1987).

200. Professor Cooley's treatise is often cited for this proposition. THOMAS M. COOLEY, *CONSTITUTIONAL LIMITATIONS* 334 (3d ed. 1974).

Reginald Heber Smith also identified a legal obligation to represent the poor without compensation grounded in English history. SMITH, *supra* note 91, at 247-49. The Supreme Court has characterized such descriptions of this obligation as "unqualified and poorly documented assertions of its existence" *Mallard*, 490 U.S. 304 n.4.

201. *Powell v. Alabama*, 287 U.S. 45, 73 (1932).

202. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 286 (1988).

203. See *infra* note 218.

204. The primary scholarship on compulsory service identifies the attorney as a failsafe protection when the state fails its obligation. See *supra* note 200.

205. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25 (1982); see also LUBAN, *supra* note 202, at 277-78.

206. *Shapiro*, *supra* note 141, at 736-38.

thousand or more hours of attorney time regularly conscripted in court appointments to a capital defense. Seizing a substantial portion of an attorney's productive hours under the aegis of public service is beyond the wildest dreams of even the most impassioned advocates of pro bono service.²⁰⁷

Furthermore, the ABA rejected the position that attorneys can be compelled to supply pro bono services in criminal cases.²⁰⁸ Few attorneys are qualified to try criminal cases;²⁰⁹ still fewer are competent to mount a capital defense.²¹⁰ Compelled criminal pro bono service would either conscript unqualified counsel or impose an overwhelming burden on a small segment of the bar.²¹¹ The attorneys qualified to represent capital defendants at trial largely belong to small firms or are sole practitioners,²¹² and are therefore incapable of spreading the cost among many attorneys in a large office. Essential to the notion of public service is that pro bono work is *given* by the attorney, not *compelled* by the court on pain of sanction. Compulsion would strip pro bono service of its charitable character and oblige the attorney to the court's choice of service. Were the bar to adopt a mandatory pro bono requirement, it nevertheless would be inappropriate for the court to determine how and for whom each attorney's public service should be rendered.²¹³ Most attorneys view pro bono representation as a charitable contribution of legal services; the attorney should be able to determine to whom and in what form that donation will be made. Neither duty nor ethics justify the imposition on members of the bar of what is, at bottom, the state's obligation to the indigent defendant.

B. *The State's Obligation to the Indigent Defendant*

The state, not the bar, ultimately owes the criminally accused meaningful assistance of counsel. The accused's Sixth Amendment right is guaranteed against any judgment the state might win in violation of that right. Thus, the usual remedy for failure to provide effective assistance is the reversal of a conviction prosecuted in the state's, not the bar's, interest. Effective defense counsel not only benefit the state by allowing the successful prosecution of criminals, but also by

207. *See id.*

208. AMERICAN BAR ASSN. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE STANDARDS RELATING TO PROVIDING DEFENSE SERVICES, Standard 5.2(a), commentary at 47-48 (Approved Draft 1968) (quoting POST-CONVICTION REMEDIES, Standard 4.4(a) (Tentative Draft 1967)); *see also* Wilson, *supra* note 53, at 206-07.

209. SILVERSTEIN, *supra* note 54, at 19; LEFSTEIN, *supra* note 93, at 18.

210. *See supra* section II.C.

211. LEFSTEIN, *supra* note 93, at 18; Hunter, *supra* note 33, at 10-11.

212. *See supra* note 54.

213. ROSCOE POUND, AM. TRIAL LAWYERS FOUND., THE AMERICAN LAWYER'S CODE OF CONDUCT ch. VIII, cmt. (1982).

safeguarding constitutional protections that benefit every member of the society.

The fundamental character of the right to counsel depends largely on the adversarial nature of the criminal justice system.²¹⁴ The prosecution brings to bear the vast resources of the state to try a criminal defendant.²¹⁵ The accused must be allowed the opportunity to subject the prosecution's case to "the crucible of meaningful adversarial testing."²¹⁶ In its appeal for the adequate compensation of appointed counsel, the Allen Commission suggested:

[N]o one would be likely to urge that the government's interest in effective prosecution of criminal cases can be adequately advanced by delegating the prosecuting function to lawyers who receive no compensation for their services Yet the proper functioning of the adversary system of justice, *in which the nation as a whole has an important stake*, demands that the defense of accused persons proceed at a level of zeal and effectiveness equivalent to that manifested in their prosecution. The notion that the defense of accused persons can fairly or safely be left to uncompensated attorneys reveals the fundamental misconception that the representation of financially deprived defendants is essentially a charitable concern. On the contrary, *it is a public concern of high importance*. A system of adequate representation, therefore, should be structured and financed in a manner reflecting its public importance.²¹⁷

The defense of the indigent accused is an essential element of the adversarial system, without which the prosecution cannot properly proceed.²¹⁸ The state benefits from the defense of the indigent accused through the protection of its constitutional principles²¹⁹ and in the le-

214. See *United States v. Cronin*, 466 U.S. 648, 655-56 (1984); *United States v. Morrison*, 449 U.S. 361, 364 (1981); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); Lefstein, *supra* note 39, at 12.

215. *Gideon*, 372 U.S. at 344.

216. *Cronin*, 466 U.S. at 656; see White, *supra* note 138, at 237.

217. ATTORNEY GENERAL'S REPORT, *supra* note 35, at 48-49 (emphasis added); see also Benner, *supra* note 35, at 684 (appeal to charity cannot satisfy the constitutional right to effective assistance of counsel).

218. The Supreme Court of New Jersey found that the necessary expenses of a prosecution include "the expense of providing counsel for an indigent accused, without which a prosecution would halt and inevitably fail under *Gideon v. Wainwright*." *State v. Rush*, 217 A.2d 441, 449 (N.J. 1966). The Illinois court similarly found that, "[i]f such judicial power [to order excess compensation] did not exist, the courts probably could not proceed, and certainly could not conclude the trial of indigent defendants" *People ex rel. Conn v. Randolph*, 219 N.E.2d 337, 340 (Ill. 1966). Likewise, a Kentucky court held that "the state either must see that the defendant is provided counsel or it cannot proceed with the prosecution." *Bradshaw v. Ball*, 487 S.W.2d 294, 298 (Ky. 1972) (quoting *Jones v. Commonwealth*, 457 S.W.2d 627, 631-32 (Ky. 1970)).

219. Adopting this rationale, the Supreme Court of Alaska held:

Counsel is appointed not out of a desire to benefit any individual defendant, but to ensure that all defendants are treated equally before the law, that all defendants will receive a fair trial before an impartial tribunal. . . . Because the appointment thus benefits all persons equally, the cost of providing such representation must be equally borne rather than shunted to specific persons or specifically identified classes of persons.

We thus conclude that requiring an attorney to represent an indigent criminal defendant

gitimate operation of its criminal justice system.²²⁰ The state, therefore, should bear all the component costs of the system, just as it bears the costs of the judiciary and the prosecution.²²¹

Shifting the duty of indigent representation onto the yoke of the defense bar not only neglects the state's obligation, but also derogates the defendant's right to counsel. The state recognizes its responsibility to the justice system through the funding of the system's operations. It does not ask its police officers, prosecutors, or judges to perform their duties with nominal recompense. Nevertheless, only two percent of criminal justice spending goes to the defense of indigents,²²² a group comprising forty-eight percent of the criminally accused.²²³ The result is a necessarily skewed social commitment in the adversarial system, emphasizing the interest of the state in conviction and minimizing the constitutional rights of the accused. The adversarial process requires a balance of skill and resources to reach an equitable result.²²⁴ By funding prosecutorial functions and relegating indigent defense to the ethical aspirations of the legal profession, the state has put its thumb on the scales of justice. The social commitment should be no less for protecting the rights of the accused than for convicting the guilty.

Most troubling, the appeal to the professional and ethical obligations of the bar deflects attention from the accused's right to counsel to the attorney's duty to the court.²²⁵ As reiterated throughout this analysis, the defendant's right to effective representation must remain at the fore, as the Sixth Amendment is satisfied by nothing less.²²⁶ A system of indigent representation that deters and impedes effective representation cannot satisfy the constitutional requirement of counsel

for only nominal compensation unfairly burdens the attorney by disproportionately placing the cost of a program intended to benefit the public upon the attorney rather than upon the citizenry as a whole.

DeLisio v. Alaska Superior Court, 740 P.2d 437, 443 (Alaska 1987) (citation omitted). In this vein, the Florida Supreme Court has held that "since the State of Florida enforces the death penalty, its primary obligation is to ensure that indigents are provided competent, effective counsel in capital cases." White v. Board of County Commrs., 537 So. 2d 1376, 1379 (Fla. 1989).

220. The state's interest in the representation of the poor draws from its interest in the legitimacy of its legal order. Without equal justice, the entire system forfeits its legitimacy for both the indigent and the wealthy. See LUBAN, *supra* note 202, at 286; Klein, *supra* note 95, at 682-83. See generally Paul D. Carrington, *The Right to Zealous Counsel*, 1979 DUKE L.J. 1291 (the appearance of effective representation for criminal defendants is important to public trust in the fairness of the entire legal system).

221. AMERICAN BAR ASSN., *supra* note 83, at 80; Lefstein, *supra* note 39, at 12.

222. The justice system expenditures for fiscal year 1986 totalled \$53,499,805,000 and expenditures for indigent defense programs reached an estimated \$991,047,250. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1988 at 136 (Katherine M. Jamieson & Timothy J. Flanagan, eds., 1989).

223. SPANGENBERG et al., *supra* note 14, at 33.

224. ATTORNEY GENERAL'S REPORT, *supra* note 35, at 48.

225. Wilson, *supra* note 53, at 206.

226. See McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

with mere reference to the lofty ideals ascribed to the profession.²²⁷

In reconciling the state's obligation to provide indigent defense and the attorney's professional and ethical obligations, the Supreme Court of Florida placed an insightful gloss on *Gideon*:

[A]fter *Gideon*, dual obligations arose regarding the representation of indigents in criminal cases: the constitutional obligation of the state created under *Gideon* and the ethical obligation of the attorney that accompanies the profession. When an attorney is called upon by the state to represent an indigent defendant in a criminal case, not only is the attorney expected to provide legal services as part of his or her professional ethical obligation, but the state, as part of its constitutional obligation, must reasonably compensate the attorney for those services.²²⁸

The burden of providing representation to indigent defendants belongs to the society as a whole and cannot be carried by the defense bar alone. The bar may assume responsibility for the cases that slip through the cracks, but professional obligation and ethical aspiration should not provide a means to shift the state's obligation onto the bar. If we are to claim the benefits of a system that metes out justice without regard to the wealth of the accused, we must pay the price for that system. A critical component, and therefore cost, of that system is the effective assistance of counsel.

CONCLUSION

The Sixth Amendment requires the state to provide effective representation to the indigent accused. Although free to devise their own systems of indigent representation, states must ensure that their obligation to the defendant is met. That obligation does not cease by merely pointing a finger at the attorney and reciting professional obligations.

Capital defense is perhaps one of the most complex, weighty, and important obligations borne within our legal system. Yet the compensation structure for appointed counsel makes only a token contribution to the defense of the capital accused. The defendant's right to counsel, therefore, falls to concerns of economy and the attorney's financial self-interest. When the system of indigent representation fails, the state has failed to meet its obligation under *Gideon*.

James Baldwin poignantly observed that "[t]he fate of [a criminal

227. The American Bar Association has rejected the simple invocation of Sixth Amendment ideals as sufficient to satisfy its requirement:

A general statement of high purpose alone will not suffice to ensure high quality representation. Attorney error is often the result of systemic problems, not individual deficiency. The provision of counsel for indigent capital defendants (where counsel is provided at all) often incorporates the worst features of the universally condemned ad hoc system for assigning counsel, which is at odds with the notion of quality representation.

AMERICAN BAR ASSN., *supra* note 83, at 35 (1989). See Lefstein, *supra* note 39, at 9.

228. *White v. Board of County Commrs.*, 537 So. 2d 1376, 1379 (Fla. 1989).

defendant] depends, to put it brutally, on [his] money: one may say, generally, that, if a poor man in trouble with the law receives justice, one can suppose heavenly intervention."²²⁹ A system of indigent representation cannot rely on divine intervention to protect the rights of the criminally accused; it must recognize and conform to the economic realities of legal practice. Inevitably, a handful of committed and laudable attorneys will undertake personal sacrifice to provide effective representation to those unable to afford it, but the rights of the accused cannot be left to chance assignment. For the indigent defendant, fee limitations place an economic burden on appointed counsel and create strong disincentives to zealous representation.

229. JAMES BALDWIN, *No Name in the Street*, in *THE PRICE OF THE TICKET: COLLECTED NONFICTION 1948-1985* at 524 (1985).